FILED
COURT OF APPEALS
DIVISION II

08 NOV 20 AM 11:25

STATE OF WASHINGTON
BY Cm
DEPUTY

83570-5

No. 37566-4-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. MAROHL,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James. B Sawyer II, Trial Court Judge
Cause No. 07-1-00315-1

BRIEF OF RESPONDENT

EDWARD P. LOMBARDO
Deputy Prosecuting Attorney for
Gary P. Burleson, Prosecuting Attorney

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Tel: (360) 427-9670 Ext. 417
Fax: (360) 427-7754

TABLE OF CONTENTS

A. Appellant's Assignments of Error.....1

B. Issues Pertaining to Assignments of Error.....1

C. Evidence Relied Upon.....2

D. Statement of the Case.....2-3

1 & 2. Procedural History & Statement of Facts.....2

3. Summary of Argument.....2-3

E. Argument.....3-9

1. THE TRIAL COURT DID NOT ERR BY NOT TAKING MAROHL'S CASE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE HE (MAROHL) TOOK MR. PETERSON IN EITHER A CHOKEHOLD OR ARMLOCK AND SLAMMED HIM FACE-DOWN INTO A BARROOM FLOOR, CUTTING AND BRUISING HIS FACE AND BREAKING HIS PROSTHETIC ARM.....3-5

2. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING THE JURY THAT A BARE HAND OR ARM IS NOT "A WEAPON OR OTHER INSTRUMENT OR THING" UNDER RCW 9A.36.031(d) BECAUSE MAROHL SLAMMED MR. PETERSON'S FACE INTO A BARROOM FLOOR; AN OBJECT THAT QUALIFIES AS A "THING" FOR THE PURPOSES OF ASSAULT IN THE THIRD DEGREE.....5-7

3. THE TRIAL COURT DID NOT ERR BY ALLOWING MAROHL TO BE REPRESENTED BY COUNSEL WHO DID NOT OBJECT TO THE LACK OF, NOR OFFER AN INSTRUCTION, STATING THAT A BARE HAND OR ARM IS NOT "A WEAPON OR OTHER INSTRUMENT OR THING" BECAUSE SUCH AN INSTRUCTION WAS UNNECESSARY.....7-9

Page(s)

F. Conclusion.....9

TABLE OF AUTHORITIES

1. Table of Cases

State v. Faagata, 193 P.3d 1132 (2008).....3, 4

State v. Flores, 164 Wash.2d 1, 186 P.3d 1038 (2008).....7

State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969).....8

State v. McFarland, 127 Wash.2d 322, 899 P.2d 1251 (1995).....7, 8

State v. Partin, 88 Wash.2d 899, 567 P.2d 1136 (1977).....4

State v. Rodriguez, 121 Wash.App. 180, 87 P.3d 1201 (2004).....8

State v. Studd, 137 Wash.2d 533, 973 P.2d 1049 (1999).....7

State v. Theroff, 25 Wash.App. 590, 608 P.2d 1254 (1980).....4

State v. Thomas, 150 Wash.2d 821, 83 P.3d 970 (2004).....4

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972).....8

2. Other Jurisdictions

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984).....8

3. Court Rules

RAP 10.3(b).....2

4. Statutory Authority

RCW 9A.36.031(d).....1, 2, 4, 5

Page(s)

5. Other

Black's Law Dictionary, Sixth Ed. (1991).....6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence.

2. The trial court erred in failing to instruct the jury that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of RCW 9A.36.031(d).

3. The trial court erred in permitting Marohl to be represented by counsel who provided ineffective assistance by failing to object that the jury was improperly instructed for failure of the trial court to instruct that a bare hand or arm is not "a weapon or other instrument or thing" for the purposes of third degree assault under RCW 9A.36.031(d).

4. The trial court erred in permitting Marohl to be represented by counsel who provided ineffective assistance by failing to propose an instruction that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of third degree assault under RCW 9A.36.031(d).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not taking Marohl's case from the jury for lack of sufficient evidence when he (Marohl) took Mr. Peterson in either a chokehold or armlock and then slammed him face-down into a barroom floor, cutting and bruising his face and breaking his prosthetic arm?

2. Did the trial court err by not instructing the jury that a bare hand or arm is not "a weapon or other instrument or thing" under RCW 9A.36.031(d) when Marohl slammed Mr. Peterson into a floor; an object that is absolutely a "thing" for the purposes of assault in the third degree?

3. Did the trial court err by allowing Marohl to be represented by counsel who did not object to the lack of, nor offer an instruction, that a bare hand or arm is not "a weapon or other instrument or thing" when such an instruction was unnecessary?

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Marohl's recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err by not taking Marohl's case from the jury for lack of sufficient evidence because he (Marohl) took Mr. Peterson in either a chokehold or an armlock and slammed him face-down into a barroom floor, cutting and bruising his face and breaking his prosthetic arm. After viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Marohl guilty beyond a reasonable doubt of committing assault in the third degree.

The trial court also did not err by not instructing the jury that a bare hand or arm is not "a weapon or other instrument or thing" under RCW 9A.36.031(d) because Marohl slammed Mr. Peterson's face into barroom floor; an object that absolutely qualifies as a "thing" for the purposes of assault in the third degree.

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

Lastly, the trial court did not err by allowing Marohl to be represented by counsel who did not object to the lack of, nor offer an instruction, that a bare hand or arm is not "a weapon or other instrument or thing" because such an instruction was unnecessary and an objection would have been without merit. Mr. Peterson would not have sustained his injuries but for Marohl's driving him face-first into the floor. The decision of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT TAKING MAROHL'S CASE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE HE (MAROHL) TOOK MR. PETERSON IN EITHER A CHOKEHOLD OR ARMLOCK AND SLAMMED HIM FACE-DOWN INTO A BARROOM FLOOR, CUTTING AND BRUISING HIS FACE AND BREAKING HIS PROSTHETIC ARM.

The trial court did not err by not taking Marohl's case from the jury for lack of sufficient evidence because he (Marohl) took Mr. Peterson in either a chokehold or an armlock and slammed him face-down into a barroom floor, cutting and bruising his face and breaking his prosthetic arm.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

State v. Faagata, 193 P.3d 1132, 1139 (2008). When the sufficiency of evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Partin, 88 Wash.2d 899, 906-907, 567 P.2d 1136 (1977).

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004). Issues of conflicting witness testimony, witness credibility and the persuasiveness of the evidence must be left to the trier of fact. Thomas, 150 Wash.2d at 874-875.

Count Two of Marohl's amended information filed on January 29, 2008, reads as follows:

> In the County of Mason, State of Washington, on or about the 27th day of June, 2007, the above-named defendant, JAMES M. MAROHL, did commit ASSAULT IN THE THIRD DEGREE, a Class C Felony, in that said defendant, with criminal negligence, did cause bodily harm to another person, to wit: Joseph Peterson, by means of a weapon or other instrument or thing likely to produce bodily harm, contrary to RCW 9A.36.031(d) and against the peace and dignity of the State of Washington. CP 48.2.

Instruction No. 15 informed the jury that:

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.
>
> Criminal negligence is also established if a person acts intentionally or knowingly or recklessly. CP 52.

By slamming Mr. Peterson face-first in to the barroom floor and in the process cutting and bruising his face and breaking his prosthetic arm, Marohl acted with criminal negligence. Taking all reasonable inferences in favor of the State, a jury could therefore find that Marohl was guilty of assault in the third degree, and no error occurred.

2. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING THE JURY THAT A BARE HAND OR ARM IS NOT "A WEAPON OR OTHER INSTRUMENT OR THING" UNDER RCW 9A.36.031(d) BECAUSE MAROHL SLAMMED MR. PETERSON'S FACE INTO A BARROOM FLOOR; AN OBJECT THAT QUALIFIES AS A "THING" FOR THE PURPOSES OF ASSAULT IN THE THIRD DEGREE.

The trial court did not err by not instructing the jury that a bare hand or arm is not "a weapon or other instrument or thing" under RCW 9A.36.031(d) because Marohl slammed Mr. Peterson's face into barroom floor; an object that qualifies as a "thing" for the purposes of assault in the third degree.

As the deputy prosecutor for the State argued in closing:

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

> The instrument of thing here, obviously, is a combination of the arm lock, the choke lock, and taking him into the ground and slamming him into the floor. There's no requirement that-it's a broad thing. Instrument or thing. That's all in your-within your providence (sic) to decide those are the instruments or things. There isn't a limited number of things in the law by which an assault third can be committed and no other. It's a very broad definition. Any instrument or thing...[Y]ou simply take the facts that you have and say, what instrument or thing did he use with criminal negligence to inflict this harm. RP 449: 1-12.

Mr. Peterson described his injuries as follows:

> I felt like I got beat up pretty bad. I mean, I was-my head was pretty groggy and I was in a lot of pain...[M]y arm hurt real bad because I had landed on my prosthetic arm and it jammed my shoulder into my body. And then my face hit the ground and my whole-my jaw got real tweaked out of line and my-I had a real bad headache and my face was all scraped up and my jaw was hurting real bad. And then on top of that, like I said, my arm landed straight down on the concrete floor, or rug-concrete underneath, and I tweaked out my body pretty bad. RP 100: 14-25.

Any additional instruction that a bare hand or arm is not a weapon or other instrument or thing would have been unnecessary because the barroom floor was the primary "thing" that Marohl used to injure Mr. Peterson. "Things real" in Black's Law Dictionary are defined as being, "permanent, fixed and immovable, which cannot be carried out of their place." Black's Law Dictionary, 1479, Sixth Ed. (1991). A concrete, barroom floor absolutely fits this definition, as it is permanent, fixed and immovable.

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

Put another way, Mr. Peterson did not sustain his injuries through the chokehold or armlock, but through Marohl's act of violently driving him face-first into a concrete, barroom floor. Were it not but for Marohl's criminal act of throwing him to the floor, Mr. Peterson would not have sustained the injuries he described. If any instructional error did occur it was harmless, because the evidence of Marohl's guilt was so overwhelming that it necessarily would have led to him being found guilty of assault in the third degree. See: State v. Flores, 164 Wash.2d 1, 19, 186 P.3d 1038 (2008)("overwhelming untainted evidence test").

3. THE TRIAL COURT DID NOT ERR BY ALLOWING MAROHL TO BE REPRESENTED BY COUNSEL WHO DID NOT OBJECT TO THE LACK OF, NOR OFFER AN INSTRUCTION, STATING THAT A BARE HAND OR ARM IS NOT "A WEAPON OR OTHER INSTRUMENT OR THING" BECAUSE SUCH AN INSTRUCTION WAS UNNECESSARY.

The trial court did not err by allowing Marohl to be represented by counsel who did not object to the lack of, nor offer an instruction, stating that a bare hand or arm is not "a weapon or other instrument or thing" because such an instruction was unnecessary.

We start with the strong presumption that counsel's representation was effective. State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). This requires the defendant to demonstrate the absence of

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004).

Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland, 127 Wash.2d at 335-336. Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Counsel for Marohl was not ineffective when she: (a) did not object that the jury did not receive an instruction that a bare hand or arm is not a weapon or other instrument or thing; nor (b) for not proposing such an instruction herself, because one would have been unnecessary. As was argued above, were it not but for Marohl throwing Mr. Peterson onto the

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

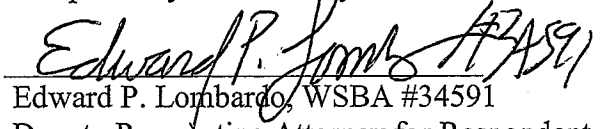
concrete, barroom floor, he would not have sustained the injuries that he did. Counsel for Marohl was not ineffective because she refrained from making a meritless objection. That Marohl was found guilty of assault third instead of the far more serious crime of assault in the second degree demonstrates that she employed a definite as well as successful trial strategy.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 18TH day of NOVEMBER, 2008

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

Mason County Prosecutor's Office
521 North Fourth Street
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JAMES M. MAROHL, Appellant,	)	No. 37566-4-II DECLARATION OF FILING/MAILING PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
08 NOV 20 AM 11:26
STATE OF WASHINGTON
BY _____
DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On TUESDAY, NOVEMBER 18, 2008, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 18TH day of NOVEMBER, 2008, at Shelton, Washington.

Edward P. Lombardo, WSBA #34591

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417
Fax (360) 427-7754